

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-4213

To be Argued by
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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 77-4213

MAID OF THE MIST CORPORATION and
Affiliated Corporations,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

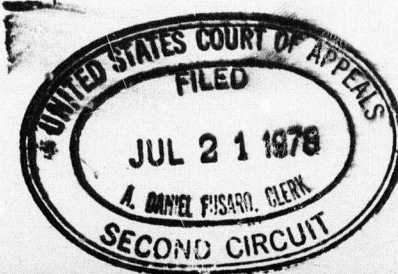
Respondent-Appellee.

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P/S

Appeal From the United States Tax Court

BRIEF OF PETITIONER-APPELLANT

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Preliminary Statement

This is an appeal from the decision of the Honorable Theodore Tannenwald, Jr., Judge of the United States Tax Court. That decision has been reported in Prentice Hall Memo T.C., Par. 77-263.

Statement of Issue

Was the investment credit claimed by the petitioner for the construction of a vessel in Ontario, Canada, barred by the provisions of Section 48(a)(7)B;(ii) of the Internal Revenue Code?

The contract in question is in the amount of \$129,737.32 and the investment credit claimed is in the amount of \$9,081.61.

The issue to be decided is whether the petitioner placed an "order" prior to December 20, 1971.

Statement of the Case

(A) Nature of the action and course of proceedings.

This proceeding was commenced by the petitioner in the United States Tax Court by the filing of a petition on January 19, 1976. Thereafter, the matter was heard by the Honorable Theodore Tannenwald, Jr., Judge of the United States Tax Court, in Buffalo, New York, on the 11th day of November, 1976, and on August 11, 1977, the findings of fact and opinion of the Court was filed denying the petitioner the relief it sought.

(B) Disposition of Court Below.

Judge Tannenwald found as follows:

"We have no doubt that Ltd. placed an order prior to December 20, 1971, within the meaning of this regulation. Irrespective of whether the December 16 agreement constituted a legally binding contract prior to Hike's receipt of the check, the mailing of the check on December 18 at the very least made the previously signed agreement an unconditional offer to purchase the vessel and therefore an "order" by Ltd. as of that date. Moreover, we think that Ltd. and Hike agreed to be bound by the December 16 agreement, subject only to Ltd's obtaining a contract for the delivery of the vessel. This was accomplished on December 18, 1971, so that, from that time onward, the parties were unconditionally bound. See McCool v. Grant & Dunn, 48 Ont. L.R. 630 (1921); Saskatchewan Co-op. Wheat Producers, Ltd. v. Zurowski, 3 D.L.R. 810 (1926, Sask. Ct. App.). See also 5 Williston on Contracts, sec. 663 (3d ed.1961)." (Joint Appendix, Pages 8, 9)

(C) Statement of facts.

All of the facts surrounding the execution and delivery of this contract have been stipulated to by the parties. A summary of these facts is as follows:

The petitioner, Maid of the Mist Corporation, is a New York corporation, having a solely owned subsidiary, Maid of the Mist Steamboat Company, Limited. The business of these corporations is to operate the world famous tour boats at the base of Niagara Falls in the international waters of the Niagara River.

Prior to the 16th day of December, 1971, the petitioner negotiated the terms of a contract for the construction of a new vessel. A construction contract was prepared by Canadian counsel for the petitioner and on the 16th day of December, 1971, that contract was executed by the parties thereto at Port Dover, Ontario, and the document was conditionally delivered to the shipbuilder with a letter setting forth the conditions of that delivery and also there was a withholding of the deposit required by the aforementioned document. In essence, that letter provided that delivery of this document would not be completed until the shipbuilder was in "receipt" of the \$3,000 00 down payment. The letter contained a further explanation that it was necessary that contractual arrangements be entered into assuring the availability of suitable cranes to lower the vessel to be constructed from the top of the Gorge to the Niagara River at the base of said Gorge.

December 16, 1971, was a Thursday. On December 18, 1971, a contract with Modern Crane Rentals, Ltd. was executed in the City of Niagara Falls, Ontario, and, after the contract was executed, a check in the amount of \$3,000.00 directed to the shipbuilder was deposited in a mailbox in the City of Niagara Falls, Ontario, that day.

On December 20, 1971, President Nixon issued Proclamation 4098 terminating effective that day provisions of Proclamation 4074 and, thus, made available investment credit for foreign-made goods.

On December 21, 1971, the shipbuilder received and deposited the petitioner's check of \$3,000.00.

(Joint Appendix, Pages 17-20)

ARGUMENT

I. The acts of the petitioner on December 16, 1971, through December 20, 1971, did not constitute the placing of an "order" as contemplated by Section 48(a)(7)B;(ii) of the Internal Revenue Code.

Section 48(a) of the Internal Revenue Code clearly denies investment credit for foreign-made goods if an "order" for the same was placed prior to December 20, 1971, and after August 15, 1971. The Commissioner's Regulations and the reports of the appropriate Congressional Committees clearly indicate that the term "order" need not be a contract. (Section 1.48-1(o)(2)(i), Income Tax Regs.)

The above-cited Commissioner's Regulations provide, in relevant part, as follows:

"An order is any directive, written or oral, to another person reasonably designed to effect the acquisition of property at a later date. An order need not be a binding contract."

An examination of the Internal Revenue Code and the Regulations and the cases and decisions interpreting the meaning of the term "order" has not been productive and the petitioner finds itself faced with a paucity of authority in assisting this Court in reaching its decision. The petitioner suggests the following rationale for its position:

On August 16, 1971, the President in Proclamation 4074 recognized a prolonged decline in the international monetary reserves in the United States and, therefore, declared a national emergency in which the public and private sector was called upon to make necessary efforts to strengthen the international economic position of the United States. The President then imposed a 10% supplemental duty. The obvious intent of such Proclamation was to seek to generate domestic economic activity and to dampen the investment of United States funds outside of the domestic economy. (Joint Exhibit 2-B). (Joint Appendix, Pages 21, 22 & 23)

On December 20, 1971, the President, in Proclamation 4098, (Joint Exhibit 7-G) terminated the supplemental duty

imposed by the aforementioned Proclamation 4074. (Joint Appendix, Page 54 & 55).

The use of the term "order" as implemented by the Commissioner's Regulations and as explained by the reports of various Congressional Committees makes manifest the intent of Congress to encompass all actions which ordinarily would generate foreign investment and, thus, the term "order" was designed to convey a concept broader than that of a "contract" as Congress recognized that in some sectors of the economy economic activity is generated without the formalities of an enforceable contract and, therefore, to accomplish its purpose, it sought to embrace all those situations which would generate economic activity contrary to the best interests of the balance of payments.

BNA Tax Management Portfolio 192-2nd, 1971, discusses the implications of the provisions dealing with the suspension and restoration of investment credit - 1966 and 1967, which provisions were enacted into law on November 8, 1966. (P.L. 89-800, 89th Cong., 2nd Sess.) The language used is exactly the same as before the court "pursuant to an order placed". The textwriter in a comment commencing on Page A-43 and ending on Page A-44 writes as follows:

"In view of the countless variations in factual situations and the trade practices governing or affecting them, it is impossible to lay down a general definition of an "order". It is clear that an order need not be a legally binding commitment nor a formal written document. In the light of the underlying purpose of the statute, the test probably ought to be whether there was a sufficient commitment before March 10 to justify the supplier in relying on it and therefore in generating economic activity. The House Committee Report says: "Any directive, written or oral, to another person reasonably designed to effect the acquisition of property at a later date, constitutes an order." (H. Report, 2087, 89th Cong. 2d Sess., p. 30.) (underlining added)

Therefore, petitioner suggests to the Court that the question before it is whether or not there was sufficient commitment on the part of this petitioner before December 20, 1971, to justify Hike Metal Products, Ltd. in relying on it to such an extent as to generate economic activity.

The determination of the Court below was in error in that it found that the conditional delivery of the contract on December 16th was a contract, subject to a condition precedent, to-wit: the obtaining of a contract for the delivery of the vessel. The Court, further, found that the mailing of the check on December 18th translated the conditional delivery into an unconditional offer to purchase the vessel, thus an "order", and found that from the date of the mailing

that the parties were unconditionally bound.

I suggest an examination of Joint Exhibit 4-D (Joint Appendix, Page 44) clearly manifests the intentions of the parties, which is the ultimate criteria of the relationship and obligations undertaken one to the other as of that date. That Exhibit is hereinafter set forth in full for the convenience of the Court:

"December 16, 1971

HIKE METAL PRODUCTS LIMITED
Village of Wheatley, Ontario

Re: Ship Building Contract, dated 14th day of
December, 1971
MAID OF THE MIST STEAMBOAT COMPANY LIMITED,
Ship Owner
HIKE METAL PRODUCTS LIMITED, Ship Builder

Gentlemen:

We hand you herewith original and duplicate copy of contract for the construction of a vessel, duly executed by the Ship Owner.

This contract is conditionally delivered to you and such delivery shall become final when you are in receipt of the Ship Owner's check payable to your order in the sum of \$3,000.00.

As you are aware, this contract contemplates the building of a ship which Ship Owner will be able to place in the Niagara River beneath the Falls of Niagara by the use of cranes. As of that date, the contract for such delivery has not been executed and it is anticipated that it will be executed within the next few days and, upon the acceptance of that contract, the undersigned will forward to you the above-mentioned check.

In the event that delivery of the contemplated vessel

is not possible by crane, then it will be necessary for us to enter into a new contract, which will call for the building of the vessel and its delivery in parts to the Maid of the Mist landing and its re-assemblage at that point before launching. Therefore, the necessity of conditioning this delivery this date.

Very truly yours,

"Port Dover
E. Haikala
12/16/71"

MAID OF THE MIST STEAMBOAT COMPANY,
LIMITED

By: _____"

It is seen from the above Exhibit the contract dated December 16th between the parties was specifically conditionally delivered on the following terms:

"such delivery shall become final when you are in receipt of the Ship Owner's check payable to your order in the sum of \$3,000.00".

Reference is made to Joint Exhibit 3-C at Page 3 (Joint Appendix, Page 27) wherein a \$3,000.00 deposit is called for upon the signing of the agreement. The Exhibit then indicates the necessity of obtaining a contract for the placing of the vessel in the Niagara River by use of cranes and that until a suitable crane contract was executed, the petitioner reserved the right to make the required down payment and go forth with the December 16th agreement.

The petitioner, in its last paragraph in Exhibit 4-D

(Joint Appendix, Page 44) specifically recognizes the need for an entire new arrangement if delivery cannot be effected by crane. Therefore, I respectfully point out to the Court that the intention of the parties specifically was not that they be bound upon the execution of the crane contract, but specifically upon the act of the shipbuilder receiving the \$3,000.00 down payment required by the agreement dated December 16th.

This intention is further manifested by the testimony of the President of the shipbuilding company, who after identifying Joint Exhibit 4-D, (Joint Appendix, Page 157) testified as follows:

"THE COURT: You mean, by enforced, you mean you do not consider yourself bound by it?

THE WITNESS: That's right.

THE COURT: All right.

MR. DOWD: Now when did you tell us when you did receive that check?

A On the 21st.

THE COURT: Of what?

THE WITNESS: December, 1971".

It is the contention of the petitioner that the acts of the parties to the agreement of December 16, 1971, as documented by the letter hereinabove set forth, clearly manifests factually the intent of the parties. Those manifestations are as follows:

1. the specific conditional delivery of the contract;
2. the retaining of the down payment required thereby
3. the recognition of the parties of the necessity to execute the crane contract prior to the effectiveness of the ship building contract;
4. the specific requirement that the down payment be received by the shipbuilder prior to the shipbuilding contract becoming effective.

This Court in Hotchkiss v. National City Bank, 200 Fed. Rep. 287, 293, stated in a decision by Learned Hand, J.:

"A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake."

It is suggested that the acts of the parties and their words represent the known intent and any construction to the contrary flies in the face of the usual meaning of such acts and words.

The key question before this court is, notwithstanding the intent of the parties, what was the effect of their acts and words in light of the Congressional intent when it and the Commissioner used the term "order".

The appellant suggests that the intent of Congress was to include any act or acts which would represent sufficient commitment for a supplier to rely upon it and commence economic activity in reliance thereon. The object of the shipbuilding contract was to cause a special purpose vessel to be built for the specialized purpose of carrying tourists in the Niagara River beneath the cascades of the Niagara. The appellant suggests to the court that the only act upon which the shipbuilder, a reasonable person, would and did act in commencing the construction of this vessel was upon its receipt of the \$3,000.00 check of the appellant. This receipt, in accord with the intent of the parties, for the first time creates a situation upon which a reasonable shipbuilder would commence economic activity. This act took place on December 21, 1971.

Just as the execution of the crane contract on the 18th day of December, 1971, provided sufficient commitment to deprive the petitioner of a investment credit because such commitment occurred in the prohibited period, fortuitously the creation of the commitment on December 21, 1971, in law and in equity requires that the investment credit be allowed regarding the shipbuilding contract.

CONCLUSION

For the foregoing reasons, the judgment of the Tax Court appealed from should be reversed and judgment entered for the petitioner-appellant in the amount of \$11,881.61, with appropriate interest.

Respectfully submitted,

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